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No. 02-954

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The question presented is:

Whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs of the body of former Deputy White House Counsel Vincent Foster taken at the scene of his death.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but it is *reprinted in* 37 Fed. Appx. 863. A prior opinion of the court of appeals in this case (Pet. App. 4a-43a) is reported at 217 F.3d 1168. The orders of the district court (Pet. App. 44a-46a, 47a-62a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 6, 2002. The government's petition for rehearing was denied on August 16, 2002 (Pet. App. 63a-64a). On November 5, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 14, 2002. On December 4, 2002, Justice O'Connor further extended the time to and including December 20, 2002, and the petition was filed on that date. Certiorari was granted on May 5, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), exempts from mandatory disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

STATEMENT

1. This Freedom of Information Act (FOIA) suit arises from the July 1993 death of Deputy Counsel to the President, Vincent W. Foster, Jr. Foster was found dead in Fort Marcy Park in McLean, Virginia, which is part of the National Park System. The United States Park Police conducted the initial investigation of Foster's death and took color photographs of the death scene, including ten pictures of Foster's body. The Park Police investigation concluded that Foster committed suicide. Pet. App. 5a; see also Press Conf. with Deputy Attorney General Philip Heyman. (Aug. 10, 1993), *reprinted in* 2 *Hearings Relating to Madison Guaranty S&L, and the Whitewater Dev. Corp.—Washington, DC Phase: On Death of Vincent W. Foster, Jr., Before the Senate Comm. on Banking, Housing & Urban Affairs*, 103d Cong., 2d Sess. 1848 (1994) (*Death of Vincent Foster Hearings*). The FBI reached the same conclusion. *Id.* at 1851, 1857, 1860; Pet. App. 5a.

Two independent counsels also investigated the Foster death, and definitively concluded that Foster committed suicide. In January 1994, Attorney General Reno appointed Robert B. Fiske, Jr., as a special counsel under Department of Justice regulations, see 28

C.F.R. Pt. 600, 603.1, with jurisdiction over matters connected with Madison Guaranty Savings and Loan Association and the Whitewater Development Corporation. Because of the possible connection between Foster and Whitewater, Independent Counsel Fiske investigated the cause of Foster's death. See Robert B. Fiske, Jr., *Report of the Independent Counsel: In re Vincent W. Foster, Jr.* (June 30, 1994) (*Fiske Report*), *reprinted in* 1 *Death of Vincent Foster Hearings* 181-373. That investigation included interviews with approximately 125 individuals, review of voluminous documentary and photographic evidence, extensive examination of physical evidence, and analysis by a panel of four nationally renowned forensic pathologists who were afforded "unrestricted access to all available investigative and scientific information and materials regarding the death of Vincent W. Foster, Jr." *Id.* at 2-6 & App. 3. Based on the unanimous conclusion of the panel of pathologists, see *id.* at App. 3, and his consideration of all the other evidence, Mr. Fiske concluded that the "overwhelming weight of the evidence compels the conclusion * * * that Vincent Foster committed suicide." *Id.* at 58; see also *id.* at 6 ("[T]here is no evidence to the contrary. This conclusion is endorsed by all participants in the investigation, including each member of the Pathologist Panel.").

The United States Senate, through its Committee on Banking, Housing, and Urban Affairs, conducted its own inquiry into the Park Police investigation of Foster's death. After assembling nearly 2700 pages of evidence and testimony from individuals involved in the investigation, see 1 & 2 *Death of Vincent Foster Hearings*, *supra*, the Senate Committee issued a 54-page report in which it concluded, without dissent, that "[t]he evidence overwhelmingly supports the conclusion

of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self-inflicted gun shot wound to the upper palate of his mouth." S. Rep. No. 433, 103d Cong., 2d Sess. 4 (1995); see also 1 *Death of Vincent Foster Hearings* 38-39 (statement of Sen. Hatch) ("There is absolutely no credible evidence to contradict the Fiske Report's conclusion that Vincent Foster took his own life and it happened at Fort Marcy Park. There is no credible evidence to the contrary. I suspect conspiracy theorists will always differ with this conclusion and little this Committee does is going to muffle their speculation."). An investigation in the House of Representatives, led by Representative William Clinger, Jr., the Ranking Minority Member of the House Committee on Government Operations, similarly concluded that "all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993." *Summary Report by William F. Clinger, Jr., Ranking Republican, House Comm. on Gov't Operations, on the Death of White House Deputy Counsel Vincent W. Foster, Jr.* 6 (Aug. 12, 1994) (*Clinger Report*).

Following enactment of the Independent Counsel Reauthorization Act in June 1994, 28 U.S.C. 591 *et seq.*, the Special Division of the District of Columbia Circuit appointed Kenneth W. Starr as Independent Counsel charged with investigating the Madison Guaranty Savings and Loan matter.[1] As part of that investi-

[1] The Independent Counsel provisions of the Act expired on June 30, 1999, 28 U.S.C. 599, but the Act permits continuation of the Office of Independent Counsel to resolve any pending matters until the Independent Counsel "determines such matters have been completed," *ibid.* The Office has now concluded all of its investigations and is completing tasks necessary to close the office, including transferring its records to the Archivist, 28 U.S.C. 594(k)(1).

gation, Mr. Starr conducted a fresh inquiry into the death of Vincent Foster. See Kenneth W. Starr, *Report on the Death of Vincent W. Foster, Jr., by the Office of Independent Counsel In re: Madison Guaranty Savings & Loan Assoc.* (Oct. 1997) (*Starr Report*), *reprinted in* J.A. 97- 212. The Independent Counsel, with the assistance of an expert pathologist, forensic scientists, an experienced suicidologist, and numerous expert homicide investigators, reviewed all of the available forensic, scientific, physical, and documentary evidence. J.A 102-103, 110-115. After a lengthy and thorough investigation, which included convening a grand jury (J.A. 102), Mr. Starr filed a 114-page report that, "based on all of the available evidence, which is considerable, * * * agrees with the conclusion reached by every official entity that has examined the issue: Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993." J.A. 212; see also J.A. 103 ("[T]o a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion.") (quoting Dr. Alan Berman).

2. Respondent Favish (respondent) filed a FOIA request with the Office of Independent Counsel for color copies of the ten death-scene photographs of Foster. J.A. 43-46. The request also sought a large number of other photographs related to the investigation of Foster's death. *Ibid.* When the Office of Independent Counsel declined to release the photographs due to its pending investigation, J.A. 47-48, 51-52, respondent filed suit in the Central District of California.[2] Follow-

[2] FOIA Exemption 7(A) authorizes the withholding of law enforcement records the production of which "could reasonably be expected to interfere with [law] enforcement proceedings," 5 U.S.C. 552(b)(7)(A).

ing publication of the Independent Counsel's report on his investigation into Foster's death, the Office released 118 photographs to respondent. Pet. App. 6a, 48a; J.A. 59, 62-67. The Office continued to assert Exemption 7(C) to withhold the death-scene photographs. J.A. 71-72 (concluding that release of the photographs "would cause Mr. Foster's surviving family members a great deal of anguish well beyond that which they have already suffered, and thus would constitute an unwarranted invasion of their personal privacy").

a. On cross-motions for summary judgment, the district court sustained the government's invocation of Exemption 7(C) with respect to the death-scene photographs. Pet. App. 47a-62a. The court explained that the public interest asserted by respondent—that of "ensuring that the [Office of Independent Counsel] conducted a proper and thorough investigation"—"is lessened because of the exhaustive investigation that has already occurred regarding Foster's death," *id.* at 58a. The court further held that respondent failed to "sufficiently explain[] how the disclosure of these photographs will illuminate any deficiencies of the [Independent Counsel] investigation." *Id.* at 59a. The district court therefore concluded that the family's privacy interest outweighed the public interest in disclosure of the photographs. *Ibid.*[3]

b. A divided court of appeals reversed and remanded. Pet. App. 4a-43a. The court agreed with every other circuit court to address the question that "the personal privacy" protected by Exemption 7(C) "extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Id.* at

[3] The district court ordered release of a photograph of Foster's eyeglasses at the death scene, and the Office of Independent Counsel complied with that order. Pet. App. 59a-60a.

13a. With respect to the public interest in disclosure that would be necessary to overcome that privacy interest, however, the Ninth Circuit held that respondent's interest in probing "how the [Office of Independent Counsel] conducted its investigation of Foster's death" sufficed, because respondent sought to examine "what [his] government is up to." *Id.* at 10a-11a. Evidence or knowledge of "misfeasance by the agency," the court declared, is not necessary, regardless of how many "other agencies have engaged in similar investigations" already. *Id.* at 11a. The court remanded the case for the district court to review the photographs *in camera* and balance "the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Id.* at 14a.

Judge Pregerson agreed with the majority that Exemption 7(C) protects the privacy interests of surviving family members, Pet. App. 14a, but in a lengthy dissent disagreed with the majority's analysis of the public interest in disclosure and its remand of the case for further proceedings, *id.* at 14a-43a. Judge Pregerson reasoned that the government's *Vaughn* index[4] was sufficiently detailed to make a remand for *in camera* review unnecessary, *id.* at 18a-22a, and that the "pain and anguish" that respondent concedes the Foster family would suffer, *id.* at 35a, outweighs the public interest in obtaining the photographs to facilitate a sixth investigation into the cause of Foster's death, *id.* at 38a-42a. Judge Pregerson also noted that, although respondent alleges that the investigation was "grossly incomplete and untrustworthy," *id.* at 38a, he "has made no showing that anyone connected with the

[4] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[Independent Counsel's] investigations—including Mr. Starr—engaged in wrongful conduct, [or] failed in his or her official duties," *ibid.* Finally, like the district court, Judge Pregerson could find no nexus between disclosure of the photographs and advancement of the asserted public interest, because respondent failed to demonstrate that the "photographs at issue will shed any light on the integrity of their investigations, the nature of the [Office of Independent Counsel's] conduct, or the correctness of its conclusions." *Ibid.*

3. a. On remand, the district court ordered release of five of the ten photographs, Pet. App. 44a-46a, including one photograph of a gun in Foster's hand that had been published previously by *Time* magazine, *id.* at 45a; see also 1 C.A. E.R. 170-171.

The government filed a motion for reconsideration, and Foster's widow and sister moved to intervene to oppose disclosure. J.A. 9. Foster's widow, Lisa Foster Moody, submitted a declaration in which she explained that Foster's "death and the manner in which he died totally devastated our family" and that, "[i]f these photographs are released, we will again be thrust in the public eye and forced to endure the pain and invasion of privacy all over again." J.A. 90. She further explained that the family has tried to "deal[] with our grief in private and * * * [t]he privacy we have sought to maintain has been our salvation." J.A. 91. She also described the impact that disclosure of the photographs would have on her and her children: "I did not even open Vince's casket for fear of seeing him distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him." *Ibid.* Disclosure of the photographs, she continued, would "cause us no end of pain and sorrow," especially if "my children hav[e] to see pictures of their

dead father on the nightly news, on the Internet and on the supermarket shelves." J.A. 92.

Sheila Foster Anthony, Foster's sister, also submitted a declaration discussing the intrusiveness of the "barrage" of media coverage that has persisted since Foster's death, and how reporters and "[c]onspiracy theorists" have "harassed my grieving family in unbelievably insensitive ways." J.A. 93-94. She explained that the "family was horrified and devastated by the photograph leaked to the press and published on a national television network of Vince's dear dead hand holding the gun he used to kill himself." J.A. 94. She further expressed her "fear" that release of the photographs would result in their publication on the Internet and would "subject my family to more public scrutiny." J.A. 95. "The horror," she continued, "of actually seeing Vince's dead body and bloody face and shirt would undoubtedly cause me extreme mental anguish * * * [and] would only bring more agony to my family." *Ibid.* Anthony concluded by "implor[ing] the Court to do all it can to protect our family, but particularly Vince's children and his 86 year old mother, from further invasion and the distressing events that surely would result from release of these photographs." J.A. 96.

The district court granted the family members' motion to intervene, but declined to alter or amend its ruling. J.A. 10.

b. In a one-sentence, unpublished disposition, the court of appeals affirmed the district court's judgment insofar as it sustained the withholding of five of the photographs and required the release of four others. Pet. App. 1a-2a. The court held, however, that one photograph ordered released by the district court—of Foster's body, as seen by looking down from the top of the berm of the slope where his body lay—had

been properly withheld by the Office of Independent Counsel. *Id.* at 2a. The four photographs ordered released include one that shows Foster's right hand holding the gun, two of Foster's right shoulder and the right side of his torso, and one of the top of Foster's head through heavy foliage. *Id.* at 45a. None of the photographs ordered released depicts Foster's face or the bullet wounds. See *id.* at 45a-46a.

Judge Pregerson again dissented on the ground that the nine "never-before-released" photographs were properly withheld under Exemption 7(C). Pet. App. 3a.[5]

SUMMARY OF ARGUMENT

Exemption 7(C) of the Freedom of Information Act strikes a calibrated balance between the public's right to understand the operations and activities of government and the privacy interests of individuals in the vast amounts of personal information that are stored in government files. The Ninth Circuit's judgment ordering the public release of law enforcement photographs of Vincent Foster's dead body at the scene of his suicide ignores that balance, by equating the public interest in disclosure with one individual's personal disbelief and distrust of the government.

A. This Court's cases have established that the personal privacy protected by FOIA exceeds constitutional and common-law conceptions and includes personal interests both in avoiding unwanted public attention and emotional disquiet, and in controlling the dissemination of personal information that was provided or collected for a particularized and limited governmental use. The release of photographic or similar records of a loved one's dead body or of that person in the throes

[5] Judge Pregerson agreed with the ordered release of the one photograph published by *Time* magazine. Pet. App. 3a.

of death implicates precisely those types of privacy interests in surviving family members. When the government takes or obtains images of persons either immediately before or after their death, it does so for specific purposes, such as law enforcement, accident investigations, or as an adjunct to military or intelligence operations. There is no well-established tradition of public access to such materials. Quite the contrary, many jurisdictions affirmatively prohibit or restrict public access to such photographs. Furthermore, the government's release of photographs of a loved one's dead body can reasonably be expected to cause substantial emotional upset and disruption of peace of mind for family members, as is powerfully documented by the declarations of Foster's family members. Tradition and culture, as well as the law, have long left to close family members the control over display of the deceased's body. FOIA does not empower any curious individual to trump those family choices.

B. That powerful privacy interest is not offset by any discernible public interest in disclosure of Foster's death-scene photographs. The Ninth Circuit concluded that it was sufficient that respondent articulated a theory of governmental conspiracy or misfeasance that, "if believed," would reveal governmental misconduct of interest to the public. That standard is wrong for three reasons.

First, this case stands as a testament both to the ease with which allegations of governmental misconduct can be leveled and the longevity that they can acquire. Five investigations conducted by officials in the Executive and Legislative Branches, as well as *two* Independent Counsels, have unanimously concluded—without dissent—that Vincent Foster committed suicide. Four of those investigations probed not just Foster's death,

but also the conduct of the Park Police investigation in and of itself. Those investigations, moreover, have considered, addressed, and rejected the theories propounded by respondent. FOIA's carefully crafted protection of personal privacy would be rendered an empty promise if it could be overcome by little more than an idiosyncratic distrust of government or the creative spawning of conspiracy theories by any one FOIA requester. Instead, consistent with the presumption of legitimacy long accorded to government records and official conduct, FOIA requests asserting a public interest only in uncovering hypothesized governmental misconduct must substantiate their allegations with new (not already refuted), credible, and objectively reasonable grounds for believing that misconduct occurred.

Second, even where a FOIA requester makes such a showing, this Court's cases establish that the public interest in disclosure must be evaluated in light of the amount of information already in the public domain. In this case, five expert investigations have resulted in the disclosure of thousands of pages of evidence and analysis and more than 100 photographs associated with the suicide. Dozens of pathology, forensic, and law enforcement experts have asked and answered the questions and theories propounded by respondent, and their conclusions have been unanimous. The test under Exemption 7(C) is not whether there is a slim prospect that release of the photographs would quell respondent's persistent, personal speculation. It is whether the *public* interest would be *significantly* advanced by disclosing these additional, highly intrusive details of Foster's death. In light of all of the information already disclosed and the investigations already undertaken, the contribution that disclosure of the photographs

would make to an informed public is marginal, if not nonexistent.

Finally, the photographs ordered released bear no substantial nexus to the public interest that respondent asserts. They reveal only Foster's death image; they show nothing directly about the Office of Independent Counsel, which did not take the photographs and was not involved in the investigation until months later. Nor do the photographs ordered released, which show Foster's shoulder, arm, and torso, cast any light on whether Foster shot himself in the mouth or neck. Respondent's personal desire to see for himself, in addition to all of the evidence already available to him, what Foster looked like immediately after his suicide cannot be equated with the general public interest in knowing that the government investigations were thorough and accurate in their conclusions. That latter interest, which is the only relevant public interest under Exemption 7(C), has been fully served. Further private probing, which could come only at enormous expense to the surviving family members, is unwarranted.

ARGUMENT

THE OFFICE OF INDEPENDENT COUNSEL PROPERLY WITHHELD PHOTOGRAPHS OF VINCENT FOSTER'S BODY AT HIS DEATH SCENE UNDER EXEMPTION 7(C) OF THE FREEDOM OF INFORMATION ACT

In applying Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(C), courts must first determine whether the records at issue were "compiled for law enforcement purposes," 5 U.S.C. 552(b)(7). In this case, there is no dispute that the photographs at issue are law enforcement records. They were taken by law enforcement officials at the

scene of a death for the purpose of investigating the cause of death. See J.A. 87. Accordingly, the applicability of Exemption 7(C) turns upon weighing the public interest in disclosure of the documents against the invasion of privacy that disclosure would cause. *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989). Because disclosure of the death-scene photographs would intrude significantly on the privacy of the Foster family without measurably advancing the general public interest in understanding governmental activity, the photographs are exempt from disclosure under FOIA.

A. Disclosure Of The Photographs Could Reasonably Be Expected To Intrude Upon The Surviving Family Members' Privacy

1. *Protecting Against Unwarranted Intrusions On Personal Privacy Under FOIA Has Been A Prime Concern Of Congress*

In enacting the FOIA, 5 U.S.C. 552, Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for "broad disclosure of Government records," Congress also "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Department of Justice* v. *Julian*, 486 U.S. 1, 8 (1988) (quotation marks omitted). Because "public disclosure is not always in the public interest," Congress "provided that agency records may be withheld" if they fall within one of the Act's nine exemptions. *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). Those exemptions "are intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

Congress was aware, in particular, that vast amounts of personal information about individuals routinely accumulate in government records. See, *e.g.*, H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book* 32 (Comm. Print 1974) (*1974 Source Book*) (a number of agencies "have great quantities of files containing intimate details about millions of citizens"). As a consequence, the two "vital and deeply held commitments in our democratic system * * * [of] privacy and the right to know[]" could "inevitably impinge one against another." *Attorney General's Memorandum on the Public Information Section of the Admin. Procedure Act* at iii (June 1967) (*1967 Attorney General Mem.*). In response to that problem, "[a]t the same time that a broad philosophy of 'freedom of information'" was enacted into law, Congress sought to "protect certain equally important rights of privacy with respect to certain information in Government files." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (quoted in *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 n.9 (1976)); see also S. Rep. No. 221, 98th Cong., 1st Sess. 21 (1983) ("Since passage of the FOIA in 1966, Congress has recognized the need to balance an open government philosophy against legitimate concerns for the privacy of individuals.").

To that end, two of FOIA's nine exemptions are directed specifically to protecting the privacy of personal information in government records. The broadest protection for privacy under the FOIA is provided by Exemption 7(C), which is at issue in the present case. That provision exempts from the government's general duty of disclosure "records or information compiled for

law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

As originally enacted in 1966, Exemption 7 protected "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Act of July 4, 1966, Pub. L. No. 89-487, § 3(e), 80 Stat. 251. Because courts often construed it as a blanket exemption for all law enforcement records, Congress amended Exemption 7 in 1974 to specify that only certain classes of sensitive law enforcement material should be exempt from disclosure. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978). Accordingly, "[a]s amended, Exemption 7 requires the Government to demonstrate that a record is 'compiled for law enforcement purposes' *and* that disclosure would effectuate one or more of the six specified harms." *John Doe Agency*, 493 U.S. at 156; see also *FBI* v. *Abramson*, 456 U.S. 615, 622 (1982).

In 1986, Congress significantly broadened the scope of Exemption 7(C) to ensure that the protection of privacy it affords would not be construed in an "overly formalistic way." S. Rep. No. 221, 98th Cong., 1st Sess. 22 (1983).[6] Before the 1986 amendment, the government was required to prove that the invasion of the privacy interest at stake "would" be "unwarranted." The 1986 amendment supplied a more flexible standard.

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[6] Because the 1986 revision was enacted through a floor amendment to the Anti-Drug Abuse Act of 1986, there are no contemporaneous committee reports to consult. However, the 1983 Senate Report on the virtually identical amendments (S. Rep. No. 221, *supra*) has been cited by this Court and others as providing helpful guidance in construing the 1986 amendments. See *Reporters Committee*, 489 U.S. at 777 n.22; *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 4 & nn.6-7 (Dec. 1987).

See *Reporters Committee*, 489 U.S. at 756 n.9. In an effort to ease the government's burden in protecting personal information under Exemption 7(C), Congress replaced the phrase "would constitute an unwarranted invasion of personal privacy" with the more flexible and predictive standard of "could reasonably be expected to constitute" an unwarranted invasion of privacy. *Ibid.*; *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989). The change was "designed to make it clear that the courts should apply a common sense approach to this balancing test," and to "eliminate any possibility of an overly literal interpretation" of the exemption. S. Rep. No. 221, *supra*, at 22. That approach was deemed critical because, by their very nature, law enforcement investigations commonly require officials to collect considerable amounts of private information about individuals, whether they are witnesses, victims, or possible suspects. The amendment embodied the judgment of Congress that, although "[n]o one questions the value of an informed citizenry; nor should anyone question the government's obligation to respect the privacy of those same citizens." *Id.* at 3.

With respect to non-law enforcement records, FOIA Exemption 6 allows the government to withhold information contained in "personnel and medical files and similar files" if the disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7(C) "is more protective of privacy than Exemption 6" because the former "applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,'" while the latter bars only disclosures "that 'would constitute' an invasion of privacy that is 'clearly unwarranted.'" *Department of Defense* v. *FLRA*, 510 U.S. 487, 496-497 n.6 (1994). The two exemptions thus

"differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions," *id.* at 497.

2. *FOIA's Privacy Protection Extends To Control By Close Family Members Over Sensitive Matters And Personal Decisions Concerning The Death Of A Loved One*

a. *The scope of FOIA's privacy protection*

Exemption 7(C) protects against unwarranted invasions of "personal privacy." 5 U.S.C. 552(b)(7)(C). Nothing in the statutory text limits the privacy protected to that of the subject of the requested record. Indeed, since FOIA's enactment, the privacy exemptions have been understood to "includ[e] members of the family of the person to whom the information pertains." *1967 Attorney General Mem.* 36. Even when Congress narrowed Exemption 7's scope in 1974 by identifying particular categories of information for withholding, the reference to personal privacy in Exemption 7(C) was understood to "protect[] relatives or descendants of" persons under investigation, and to factor into the withholding decision the "possible adverse effects upon [the individual] or his family." *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9-10 (Feb. 1975); see also *Department of State* v. *Ray*, 502 U.S. 164, 176 (1991) (privacy interest includes embarrassment that disclosure could cause for returned Haitian nationals "or their families"). Congress employed the modifier "personal" not to limit the protection to particular individuals, but to restrict it to natural *persons* rather than corporations or other entities.[7]

[7] See *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 602 n.4 (1982) ("[T]here are undoubtedly many Government files which contain information not personal to any particular individual * * *. Information unrelated to any particular person presumably would not satisfy the threshold test" for protection under FOIA's privacy exemptions.); *1974 Source Book* 278; *1967 Attorney General Mem.* 36-37; *Sims* v. *CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976).

Because FOIA was not intended to afford the general public a right of access to the vast amounts of "information about private citizens that happens to be in the warehouse of the Government," *Reporters Committee*, 489 U.S. at 774 (emphasis omitted), this Court has refused to adopt a "cramped notion of [the] personal privacy" that FOIA protects, *id.* at 763.[8] The Court instead has broadly defined the types of privacy interests protected by Exemptions 6 and 7(C). In *Reporters Committee*, the Court held that criminal history records—"rap sheets"—are exempted from disclosure under Exemption 7(C). *Id.* at 762-780. In so holding, the Court explained that the privacy interests protected by FOIA are more expansive than tort-law or constitutional conceptions of privacy. *Id.* at 762 n.13; see also *Marzen* v. *Department of Health & Human Servs.*, 825 F.2d 1148, 1152 (7th Cir. 1987) ("[T]he privacy interest protected under FOIA extends beyond the common law."). Exemption 7(C) also protects information about an individual that is already in the public record, but that is "intended for or restricted to the use of a particular person or group or class of persons" and is "not freely available to the public." *Reporters Committee*, 489 U.S. at 763-764 (quoting *Webster's Third New Int'l Dictionary* 1804 (1976)). The "practical obscurity" of such information and its "hard-to-obtain"

[8] See also *Whalen* v. *Roe*, 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.").

character creates a FOIA-protected privacy interest against its broad disclosure to the public. *Reporters Committee*, 489 U.S. at 762, 764.[9]

Moreover, "invasion[s]" of privacy that are "unwarranted" under FOIA extend beyond intrusions into the home, physical invasions of the body, disruption of mental solitude, and incursions on other archetypically private realms. Under this Court's cases, privacy includes the right to avoid public embarrassment, harassment, and the unwanted attention of others. In *Reporters Committee*, the Court spoke of a "privacy interest in keeping personal facts away from the public eye," especially matters that otherwise might be "wholly forgotten" due to the passage of time. 489 U.S. at 769. In *Ray*, the Court recognized that disclosure of the identities of Haitian nationals who had unsuccessfully attempted to flee to the United States and were returned to Haiti "could subject them or their families to embarrassment in their social and community relationships," 502 U.S. at 176, and that there existed a "privacy interest in protecting these individuals from any retaliatory action" or even attempted "interview[s]" by third parties that disclosure might bring about, *id.* at 177.

Likewise, in *Rose*, the Court upheld, under FOIA Exemption 6, the redaction of identifying information about third parties and witnesses from case summaries of honors and ethics hearings held by the United States Air Force Academy. Such redactions, the Court rea-

[9] See also *Department of Defense* v. *FLRA*, 510 U.S. at 497 (names and addresses exempt from disclosure); *Washington Post*, 456 U.S. at 600 (FOIA's protection of privacy is not limited to "highly personal" matters; it includes "information about a particular individual that is not intimate," such as "place of birth, date of birth, date of marriage, employment history, and comparable data").

soned, promote "privacy values" by protecting the subjects of the hearings from "embarrassment, perhaps disgrace," 425 U.S. at 376-377, due to the revival of "wholly forgotten" past events, *id.* at 381; see also *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982) ("Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.").

Accordingly, FOIA's definition of "personal privacy" extends to (i) personal information about an individual or a close family member that happens to be warehoused in government files, (ii) that was intended for or restricted to the use of particular persons, and (iii) the disclosure of which could reasonably be expected to cause embarrassment, emotional upset or anguish, injury, or unwanted public attention for the individual or family members.[10]

[10] Foster's status at the time of his death as a public official does not affect the privacy interests of his surviving family members for three reasons. First, even if Foster were a "public figure," his children, spouse, siblings, and mother are not, see *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), and their privacy interests in controlling their loved one's death image are not diminished by the deceased's prior occupation. Indeed, arguably his prominence increases the likelihood of harassment and unwanted attention for his family members. See *Fund for Const. Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 865 (D.C. Cir. 1981). Second, even public officials maintain legitimate privacy interests protected by FOIA. See, *e.g.*, *Department of Defense* v. *FLRA*, 510 U.S. at 500-502 (protecting the privacy of civil service employees); *Rose*, 425 U.S. at 381 (acknowledging privacy interests of Air Force Academy graduates who have remained in the military); *New York Times Co.* v. *NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc) (recognizing privacy interests of NASA astronauts and their families). Even if public officials' expectations of privacy may be "somewhat diminished," they "do not surrender all rights to personal privacy when they accept a public appointment."

b. *The privacy of surviving family members*

Consistent with this Court's delineation of the scope of FOIA's privacy protection, every court of appeals to address the question, including the court of appeals in this case, see Pet. App. 13a, has held both that the privacy interests of close family members survive the death of an individual who is the subject of a governmental record, and that the family members' privacy interests include controlling the images and sensitive events surrounding a loved one's death.

Tracking the privacy protection from embarrassment, mental distress, and unwanted attention recognized by this Court in *Reporters Committee*, *Ray*, and *Rose*, the lower courts' recognition of survivors' privacy interests in the images and specific details of a loved one's death has relied upon the emotional disquiet and intrusion upon the solitude of grieving families that disclosure would cause. In *New York Times Co.* v. *NASA*, 782 F. Supp. 628 (D.D.C. 1991), the court sustained the withholding under Exemption 6 of an audiotape of the Space Shuttle Challenger astronauts' last words because "[e]xposure to the voice of a beloved family member immediately prior to that family member's death * * * would cause the Challenger families pain," and disclosure to the general public under FOIA would inflict a "disruption of their peace of mind every time a portion of the tape is played within their hearing." *Id.* at 631-632, on remand from *New*

Kimberlin v. *Department of Justice*, 139 F.3d 944, 949 (D.C. Cir.), cert. denied, 525 U.S. 891 (1998) (quoting *Quinon* v. *FBI*, 86 F.3d 1222, 1230 (D.C. Cir. 1996)); see also *Lesar* v. *Department of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980). Third, respondent has never asserted that disclosure of the photographs would cast relevant light on Foster's performance of his own duties as Deputy Counsel to the President. See Pet. App. 57a.

York Times Co. v. *NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (recognizing continuing privacy interests of astronauts and their families). In *Katz* v. *National Archives & Records Admin.*, 862 F. Supp. 476 (D.D.C. 1994), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995), the court held that autopsy X-rays and similar photographs of President Kennedy were exempt from disclosure because their release would cause "additional anguish" to the surviving family, *id.* at 485. See also *Lesar* v. *Department of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980) (recognizing, with respect to the assassination of Dr. Martin Luther King, Jr., his survivors' privacy interests in avoiding "annoyance or harassment"). Where family members have religious or cultural objections to the public display of the deceased, disclosure also could inflict a profound spiritual and psychological intrusion on the survivors. See, *e.g.*, Maurice Lamm, *The Jewish Way in Death and Mourning* 29-37 (2000).

Indeed, with respect to the very photographs at issue here, the D.C. Circuit held that Exemption 7(C)'s privacy protection embraces "the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence," observing that "there seems nothing unnatural in saying that the interest asserted against it by spouse, parents, and children of the deceased is one of privacy." *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).[11] As the Ninth Circuit noted in this case, there is "a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one," and "[t]o violate that memory is to

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[11] The D.C. Circuit case involved a request for black-and-white copies of the photographs, while here respondent seeks the "highest quality" color copies of the photographs. J.A. 45; Pet. App. 22a.

invade the personality of the survivor * * * [and] an aspect of human personality essential to being human, the survivor's memory of the beloved dead." Pet. App. 13a. In that same vein, Independent Counsel Starr declined to include death-scene or autopsy photographs as part of his report "based on traditional privacy considerations." *Starr Report*, J.A. 116.[12]

While the privacy protection afforded by FOIA is broader than common-law conceptions of privacy, see *Reporters Committee*, 489 U.S. at 762 n.13, it is noteworthy that several States, under their common law, have recognized a similar right of survivor privacy in the images and other records surrounding the death of a loved one. See, *e.g.*, *Campus Comm., Inc.* v. *Earnhardt*, 821 So. 2d 388, 402 (Fla. Dist. Ct. App. 2002) ("[P]ublication of the nude and dissected body of Mr.

[12] See also *Campbell* v. *Department of Justice*, 164 F.3d 20, 33 (D.C. Cir. 1998) ("family-related privacy expectations survive death"); *Bowen* v. *FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991) (autopsy reports exempt under FOIA where disclosure would constitute a clearly unwarranted invasion of personal privacy); *Marzen*, 825 F.2d at 1152, 1154 (family has privacy interest in medical records pertaining to "circumstances surrounding the life and death of Infant Doe," because their disclosure would reveal "the intimate details connected with the family's ordeal"); *L & C Marine Transp., Ltd.* v. *United States*, 740 F.2d 919, 923 (11th Cir. 1984) (Exemption 7(C) protects "information about an individual which he could reasonably assert an option to withhold from the public at large because of * * * its possible adverse effects upon himself or his family.") (quoting *Attorney General's Memorandum on the 1974 Amendments to FOIA, reprinted in* Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974 Source Book* 520 (Comm. Print 1975); *Coleman* v. *FBI*, 13 F. Supp. 2d 75, 80 (D.D.C. 1998) (autopsy reports and photographs of the deceased victim are exempt from disclosure under Exemption 7(C) based upon "the privacy interests of the victim's family").

Earnhardt would cause his wife and children pain and sorrow beyond the poor power of our ability to express in words."), review denied, No. SC02-1635 (Fla. July 1, 2003); *Earnhardt* v. *Volusia County*, No. 2001-30373-CICI, 2001 WL 992068, at *3 (Fla. Cir. Ct. July 10, 2001) ("The publication of a person's autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members."; "[E]xamination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members."); *Reid* v. *Pierce County Med. Examiner's Office*, 961 P.2d 333, 338-341 (Wash. 1998) (immediate relatives have privacy interest in autopsy photographs because "[w]e fail to see how autopsy photographs of the Plaintiffs' deceased relatives do not constitute intimate details of the Plaintiffs' lives or are not facts Plaintiffs do not wish exposed before the public gaze"); *McCambridge* v. *City of Little Rock*, 766 S.W.2d 909, 915 (Ark. 1989) (recognizing valid privacy interest of mother of murder victim in crime-scene photographs, but finding it outweighed by a competing public interest); *Douglas* v. *Stokes*, 149 S.W. 849 (Ky. 1912) (recognizing parents' privacy-like interest in photographs of stillborn conjoined twins).[13]

[13] As the D.C. Circuit explained in rejecting a request for the same death-scene photographs of Vincent Foster, to understand the emotional intrusion on family members' traditional solitude in the burial and grieving process, "[o]ne has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos." *Accuracy in Media*, 194 F.3d at 123. See also A. Scott Berg, *Lindbergh* 273 (1998). Websites continue to display photo-

Consistent with that view, there is no broadly recognized tradition in the United States of public access to autopsy or crime-scene photographs or similar depictions of individuals immediately prior to or in the throes of their death. See, *e.g.*, *Comaroto* v. *Pierce County Med. Examiner's Office*, 43 P.3d 539 (Wash. Ct. App. 2002) (convicted child molester denied access to his victim's suicide note); *Bodelson* v. *Denver Pub. Co.*, 5 P.3d 373 (Colo. Ct. App. 2000) (restrictions on public inspection and disclosure of autopsy reports, where disclosure would harm privacy interests of family members of victims of Columbine school shooting); *Shuttleworth* v. *City of Camden*, 610 A.2d 903 (N.J. Super. Ct. 1992) (unlike autopsy reports, autopsy photographs are not public records and thus are not subject to release under state "Right to Know" law; instead, they are subject to possible release under the common law, which balances the parties' interests), certif. denied, 627 A.2d 1135 (N.J. 1992); *Globe Newspaper Co.* v. *Chief Med. Examiner*, 533 N.E.2d 1356 (Mass. 1989) (autopsy reports exempt from disclosure); *Herald Co.* v. *Murray*, 136 A.D.2d 954 (N.Y. App. Div. 1988) (same); *Galvin* v. *Freedom of Info. Comm'n*, 518 A.2d 64, 71 (Conn. 1986) (autopsy reports exempted from state freedom of information law, in part because they "could contain information which, if disclosed, might cause embarrassment and unwanted public attention to the relatives of the deceased").[14]

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graphs of the murdered child 70 years after his death. See, *e.g.*, http://www.lindberghkidnappinghoax.com/body.html.

[14] Many States have near-absolute exemptions from their freedom of information laws, or similar statutory prohibitions, that speak directly to the release of autopsy reports in full, or autopsy photographs specifically. See Alaska Stat. § 12.65.020 (Michie 2002); Del. Code Ann. title 29, § 10002(d)(15) (1997) (absolute prohibition on disclosure of records in custody of medical examiner);

Those cases and laws grow out of long-established cultural traditions acknowledging familial control over the body and image of the deceased. Few events in life are more profoundly intimate and personal than grieving over and coming to terms with the loss of a loved one. American tradition respects the privacy of the event by affording close family members the right

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Ga. Code Ann. § 45-16-27(d) (2002) (prohibiting release of autopsy photographs without written release of next-of-kin); Iowa Code Ann. § 22.7(41) (West 2001); La. Rev. Stat. Ann. § 44:19 (West Supp. 2003) (public right of inspection, but no right to reproduce); Me. Rev. Stat. Ann., title 22, § 3022(8) (West Supp. 2002); Mass. Gen. Laws. ch. 38, § 2, para. 8 (2003); Minn. Stat. § 13.83 (2002) (providing for disclosure of only enumerated categories of data on deceased individuals, not including photographs); 82-12 Op. Nev. Atty. Gen. (1982); N.H. Rev. Stat. Ann. § 611-A:8(IV) (2002); 2003 N.D. Laws 384; Okla. Stat. title 51, § 24A.5(1)(d) (2002); Or. Rev. Stat. § 146.035(5) (2001); R.I. Gen. Laws §§ 23-3-1(11), 23-3-23(a) (2002) (barring inspection or disclosure of records concerning "death" and "data related [there]to," unless authorized); S.C. Code Ann. § 17-5-535(A) (Law. Co-op. Supp. 2002) (restricting use of autopsy photographs); Tex. Crim. P. Code Ann. § 49.25(11) (West 2003); Utah Code Ann. § 26-4-17(4) (2003); Wash. Rev. Code § 68.50.105 (1997).

Several other States require a court order based upon a showing of good cause, or a similarly heightened showing, to release such material. See Cal. Civ. Proc. Code § 129 (West 1998); Fla. Stat. Ann. § 406.135 (West 2002) (exempting autopsy photographs and videotapes from state freedom of information law and requiring consideration by a court of the "seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available"); Ind. Code Ann. § 36-2-14-10 (Michie 2003) (requiring deference to privacy interests); N.Y. County Law § 677(3)(b) (McKinney 2003); W. Va. Code § 61-12-10 (2003). But see *Swickard* v. *Wayne County Med. Examiner*, 475 N.W.2d 304, 310 (Mich. 1991) (autopsy report of judge who committed suicide ordered released because family members only have a protected privacy right where "the disclosed information [would] be highly offensive to a reasonable person and of no legitimate concern to the public").

to decide, consistent with their own religious and moral preferences and any views expressed beforehand by the deceased, whether a loved one's body will be publicly viewed or not and whether funeral services or disposition of the remains will be public or private.[15] Similarly, the bodies of individuals who die in public places are routinely draped to prevent trauma to family members and unwarranted public exposure. In the case at hand, Foster's widow chose not to open her husband's casket to view him and further decided to have the casket remain closed throughout the funereal process, for profoundly personal reasons associated with her desire to preserve her memories of her husband in life. J.A. 91. FOIA was never intended to wrest control of that decision away from family mem-

[15] See Restatement (Second) of Torts § 868 (1979) (one who "prevents [the] proper interment or cremation [of a corpse] is subject to liability to a member of the family of the deceased who is entitled to disposition of the body"); *Larson* v. *Chase*, 50 N.W. 238, 240 (Minn. 1891) (recognizing the wrong inflicted on survivors by "indignity to the dead"); see also, *e.g.*, *Whitehair* v. *Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 441 (W. Va. 1985) ("The quasi-property rights of the survivors include the right to custody of the body; * * * to have the body treated with decent respect, without outrage or indignity thereto; and to bury or otherwise dispose of the body without interference."); *Bauer* v. *North Fulton Med. Ctr., Inc.*, 527 S.E.2d 240, 243 (Ga. Ct. App. 1999) ("[I]n order to respect 'those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes,' * * * this Court has consistently found that a decedent's next of kin has a personal, quasi-property right in his or her corpse to ensure its proper handling and burial.") (quoting *Louisville & N.R. Co.* v. *Wilson*, 51 S.E. 24 (Ga. 1905)); *In re Estate of Medlen*, 677 N.E.2d 33, 35-36 (Ill. App. Ct. 1997) ("The nearest relatives of the deceased have a quasi-property right in the body; this right arises out of their duty to bury the dead."); cf. *Right to Publicize or Commercially Exploit Deceased Person's Name or Likeness as Inheritable*, 10 A.L.R. 4th 1193 (1981).

bers and into the hands of any curious member of the public.

The need for such privacy protection is crucial in modern times. Whether in the performance of law enforcement functions, the administration of aviation safety, the execution of military operations, or the exploration of outer space, federal agencies not infrequently come into possession of photographs, videotapes, audiotapes, and other records of dead and dying individuals, the public disclosure of which would cause unquestionable pain and anguish for surviving family members. Examples include the videotaped murder of Wall Street Journal reporter Daniel Pearl, the cockpit audiotape of United Airlines Flight 93 that crashed in Pennsylvania on September 11, 2001, videotapes and photographs of soldiers killed in Iraq, photographs and videotapes of the remains of John F. Kennedy, Jr., and records detailing the remains of the Space Shuttle Columbia and Space Shuttle Challenger astronauts.

Furthermore, because withholding cannot be predicated on the identity of the requester, see *Reporters Committee*, 489 U.S. at 771, it is the privacy interest of surviving family members that allows the government to deny requests by child molesters, rapists, murderers, and other violent felons for photographs and other records of their deceased victims.[16] Due to the existence of websites that specialize in displaying images of dead bodies or that focus on high-profile deaths, the profound intrusion that a FOIA disclosure could inflict

[16] See, *e.g.*, *Rapist's Request for Photos Prompts Bill*, Associated Press, May 29, 2003 (convicted rapist obtained investigative photographs of his victim's genitals), available at http://www.heraldonline.com/24hour/nation/story/902243p6283580c.html; *Comaroto*, 43 P.3d at 542-544 (convicted child molester denied access to his victim's suicide note). The federal government has received comparable FOIA requests from convicts for many years.

on the private grieving process of survivors has become, in contemporary times, boundless.[17] Indeed, in declining to publicize Foster's death-scene photographs, Independent Counsel Starr noted that the "potential for misuse and exploitation of such photographs is both substantial and obvious." *Starr Report*, J.A. 116.

Established tradition and judicial practice thus demonstrate that, like the rap sheets at issue in *Re-*

[17] See, *e.g.*, *Earnhardt*, 2001 WL 992068, at *3 (listing some websites); http://deathgallery.com (broad collection of pictures ranging from World Trade Center victims, to American soldiers, to celebrities); http://www.drudgereport.com/md323.htm (pictures of American soldiers killed in Iraq); http://whyaretheydead.net/lisa_mcpherson/autopsy/ (pictures of individual who died while in care of the Church of Scientology); http://www.bobaugust.com/photo.htm (Nicole Brown Simpson crime-scene photograph); http://www.jfklancer.com/aphotos.html (purported autopsy photographs of President Kennedy's body); http://www.finda death.com (includes crime-scene photographs of Jeffrey Dahmer's victims). Because websites of this character are sometimes dismantled and reestablished under new names, the URLs may change during the pendency of this case. The fact of such websites' existence will not. See 2001 Fla. Laws ch. 2001-1, § 2 (legislative findings that "the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury"); cf. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 211 (1890) (the law's protection of privacy must recognize technological evolution in such matters as "photographic art"). While respondent's website is not similarly rife with such grotesque displays, the existence of his website, a portion of which is dedicated to the Foster investigation and already displays a number of photographs from the investigation, enhances the risk that the photographs at issue here will be displayed on the Internet. See http://www.allanfavish.com. The photographs that already have been released have been placed on the Internet by others as well. See http://www.fbi cover-up.com.

porters Committee, death-scene photographs and other images of the deceased and dying in the possession of the government are "not freely available to the public" and, instead, are "intended for or restricted to the use of a particular person or group or class of persons," giving affected family members a FOIA-protected privacy interest in restricting "the degree of dissemination." 489 U.S. at 763-764. Also like the hearing summaries at issue in *Rose* and the rap sheets at issue in *Reporters Committee*, the "passage of time" since Foster's death would exacerbate the intrusiveness of releasing the photographs. *Id.* at 763; see also J.A. 70 ("It was determined that the privacy interests are as strong—if not stronger—now than when the records were created."); cf. *Bast* v. *Department of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) ("[R]enewed publicity brings with it a renewed invasion of privacy."). Disclosure of such records would inflict the same type of profound emotional invasion and unwanted public attention that this Court has held triggers protection under Exemptions 6 and 7(C). Thus, the Foster family's privacy interest in these photographs is compelling.[18]

[18] In his own petition for a writ of certiorari, respondent has sought this Court's review of the question whether "a deceased's surviving family members [have] a privacy interest under the FOIA in photographs of the deceased's body, when those photographs do not contain any information about those family members." 02-409 Pet. i, *Favish* v. *Office of Indep. Counsel.* A separate petition for writ of certiorari filed by the Foster family members, who are respondents supporting petitioner in this case, also presents a question about the scope of survivor privacy protection under FOIA. 02-599 Pet. i, *Anthony* v. *Favish.* At the same time that the government asked the Court to hold the government's petition in this case pending decision in *Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives* v. *City of Chicago*, 123 S. Ct. 1352 (2003), the United States opposed

B. Release Of The Photographs Of Foster's Body At The Scene Of His Death Would Not Significantly Advance The General Public Interest In Understanding Governmental Activity

Balanced against that grave intrusion on family members' privacy, disclosure of the photographs of Foster's body at the scene of his death would not significantly advance any public interest that is cognizable under FOIA. In analyzing the public interest side of the Exemption 7(C) balance, the Court must consider the extent to which disclosure of the requested documents would "contribute *significantly* to public understanding of the operations or activities of the government." *Reporters Committee*, 489 U.S. at 775 (emphasis added). That is "the only relevant public interest." *Department of Defense* v. *FLRA*, 510 U.S. at 497; see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). The requester bears the burden of "identify[ing] with reasonable specificity the public interest that would be served by release." *Hale* v. *Department of Justice*, 973 F.2d 894, 900 (10th Cir. 1992), vacated and remanded on other grounds, 509 U.S. 918, reinstating judgment in relevant part, 2 F.3d 1055, 1057 (10th Cir. 1993); *King* v.

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certiorari on both of those questions, due to the absence of any circuit conflict. See 02-954 Pet. 7; 02-409 U.S. Br. in Opp. 5-7; 02-599 U.S. Br. in Opp. 5-7. This Court is now holding both respondent's and the Foster family's petitions. Because of those pending petitions and because an understanding of the privacy interest at issue helps set the groundwork for analysis of the public interest prong of the Exemption 7(C) analysis, the United States has addressed the survivor privacy issue in this brief. As this case has proceeded solely as a survivor privacy claim, there is no occasion for the Court to decide under what other circumstances privacy interests (whether of the deceased or others) may survive postmortem. Cf. *Swidler & Berlin* v. *United States*, 524 U.S. 399 (1998).

Department of Justice, 830 F.2d 210, 234 (D.C. Cir. 1987). The requester, moreover, must demonstrate more than just a general public interest in the subject matter of the request. He must show that there is a public interest in the "*specific* information being withheld." *Senate of the Commonwealth of Puerto Rico* v. *Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R. B. Ginsburg, J.). That is because, when a FOIA request "seeks no 'official information' about a Government agency, but merely [seeks] records that the Government happens to be storing," then "the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir." *Reporters Committee*, 489 U.S. at 780.

Disclosure of the photographs at issue here would not significantly, or even discernibly, advance any relevant public interest, for three reasons. There is no public interest cognizable under FOIA in investigating unsubstantiated and repeatedly refuted allegations of governmental misconduct; the voluminous disclosures of information already made by the government satisfy any public interest in probing the government's investigation of Foster's death; and, in any event, the photographs ordered released lack any substantial nexus to the public interest that respondent asserts.

1. *There Is No General Public Interest In Further Probing Unsubstantiated Or Already Refuted Allegations Of Governmental Misconduct*

Respondent has asserted a public interest in uncovering deficiencies in the Independent Counsel's investigation into Foster's death. Pet. App. 10a. In particular, respondent asserts that he needs the photographs to pursue personally his own allegations of a government-wide conspiracy to cover up the alleged murder of Foster. See generally Br. in Opp. 6-17. The

court of appeals declared that respondent's allegations and speculation of "misfeasance by the agency" amounted to a cognizable public interest under FOIA that was sufficient to outweigh the family's privacy interests, because respondent sought to examine "what [his] government is up to." Pet. App. 10a-11a. The Ninth Circuit's approach conflicts with this Court's precedent and accords insufficient protection to the privacy interests of the vast number of individuals whose personal information is stored in government files.[19]

In *Ray*, this Court held that unsubstantiated allegations of governmental misconduct in monitoring the treatment of returned Haitians would not suffice to overcome privacy interests under FOIA:

> We are also unmoved by respondents' asserted interest in ascertaining the veracity of the [government's] interview reports. There is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports. We generally accord Government records and official conduct a presumption of legitimacy. If a totally unsupported suggestion that the interest in finding out whether Government

[19] Other courts of appeals have required a more substantial showing by FOIA requesters alleging governmental misfeasance. See *Neely* v. *FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (public interest is "negligible" in the absence of a "compelling allegation of agency corruption or illegality"); *Accuracy in Media*, 194 F.3d at 124 (compelling evidence) (following *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991)); *Manna* v. *Department of Justice*, 51 F.3d 1158, 1166 (3d Cir.) ("proof of misconduct" necessary), cert. denied, 516 U.S. 975 (1995); *KTVY-TV* v. *United States*, 919 F.2d 1465, 1470 (10th Cir. 1990) ("broad unsupported statement of possible neglect" by government is insufficient to outweigh privacy concerns); *Senate of Puerto Rico*, 823 F.2d at 588 (a "general interest in getting to the bottom of" an alleged murder conspiracy is "not in itself sufficient to outweigh the privacy concerns").

> agents have been telling the truth justified disclosure of private materials, Government agents would have no defense against requests for production of private information.

502 U.S. at 179.[20]

This case is precisely what *Ray* warned against. Respondent wants the photographs of Foster at the scene of his death to satisfy himself that Foster was not murdered or to prove that he was. But six pathologists and numerous forensic scientists, law enforcement investigators (not only from the Park Police and the FBI, but also those retained by the Office of Independent Counsel), a committee of the United States Senate, Members of the House of Representatives, and two Independent Counsels already have studied the matter at length and have *unanimously* concluded that Foster committed suicide. And detailed reports of those investigations, explaining their conclusions, already have been released to the public.

Respondent's personal interest in the "blowback" and "backspatter" of blood and other morbid matters (see, *e.g.*, Br. in Opp. 7-15) are all fully and comprehensively addressed in those prior investigations by persons who (unlike respondent) are trained experts in pathology and the forensics of murder and suicide. See, *e.g.*, J.A. 111 (retention of expert in bloodspatter). As the district court noted, moreover, each subsequent investigation was undertaken for the express purpose of addressing and resolving doubts that had been posited

[20] See also *Silets* v. *Department of Justice*, 945 F.2d 227, 231 (7th Cir. 1991) (en banc) ("If we were to require only an assertion of bad faith as opposed to evidence of bad faith, we would send a signal flare to all future litigants to make certain to allege Government misconduct no matter how unsupported the allegation."), cert. denied, 505 U.S. 1204 (1992).

both about Foster's death and the predecessor inquiries. 3/9/98 Tr. 10 ("[T]here were just literally scores of people out there trying to prove your points; namely, something was amiss here, something was rotten, and none of them did."); *id.* at 6-7 ("[A]ll [the different investigators] were driven to find a negative aspect of things, not just Mr. Foster dispatching himself. And despite their demonstrated inclination, they didn't come up with anything.").[21] The pictures that

[21] Compare Br. in Opp. 7 (questioning whether gun would have remained in Foster's hand if he shot himself), with *Starr Report*, J.A. 141-143 (gun shot residue and indentations on thumb both prove that Foster fired the gun and explain why the gun remained in his hand), *Fiske Report* 34, 50 (same); compare Br. in Opp. 7 (questioning blood spatter patterns), with *Starr Report*, J.A. 146-148 (analyzing blood spatter patterns and finding them inconsistent with any theory that the body was moved); compare Br. in Opp. 9 (questioning blood spot on Foster's neck), with *Starr Report*, J.A. 133-134 & n.77, 163-164 & n.188 (finding no evidence of neck wound, refuting contrary allegations, and further noting that House and Senate inquiries both probed and rejected the neck-wound theory, as did all six persons attending the autopsy), and *Fiske Report* 33 n.* (same); compare Br. in Opp. 12 (questioning blood drainage patterns and blood transfer stain on Foster's face), with *Starr Report*, J.A. 162-168 (explaining blood flow pattern and transfer stain); compare Br. in Opp. 22 (questioning alleged absence of blood spatter on vegetation), with *Starr Report*, J.A. 158 (finding blood spatter on vegetation); compare Br. in Opp. 23 (questioning gun identification), with *Starr Report*, J.A. 180- 184 (explaining basis for concluding that the gun was Foster's); compare Br. in Opp. 23-24 (questioning whether Foster's body was dragged), with *Starr Report*, J.A. 151 (no evidence of dragging); compare Br. in Opp. 22 (discussing witness who claimed to see no gun in Foster's hand), with *Starr Report*, J.A. 177-179, 1 *Death of Vincent Foster Hearings* 391 (Officer John Rolla), and 2 *id.* at 1587 (Officer Renee Apt) (all: discussing limitations on witness's vantage point, due to severe slope of hill and heavy foliage), and *Fiske Report* 30 (witness acknowledges that "because of his position at the top of the berm and the heavy foliage, there could have been a gun in the man's hand that he did not see"). The Senate Report

respondent wants to see to confirm or dispel his own doubts were fully examined by numerous investigators, without a single individual determining that they evidenced a murder. The deviations in preliminary observations and other questions that respondent raises were all probed and were all resolved to the satisfaction of expert investigators.[22] And all of those investigations came *unequivocally* to the same conclusion: Vincent Foster committed suicide.

The conduct of those investigations by the Park Police, the FBI, the Senate Committee, Members of the House of Representatives, Independent Counsel Fiske, and Independent Counsel Starr—and the integrity of their unanimous outcomes—are entitled to a presumption of legitimacy and regularity. *Ray*, 502 U.S. 179. Under this Court's cases, that presumption can be overcome only by "clear evidence" of governmental

and the Report by Rep. Clinger also expressly address and refute many of respondent's theories. See *Clinger Report* 3-6; S. Rep. No. 433, *supra*, at 9-35.

[22] For example, respondent continues to rely on the tentative observation of one paramedic that he saw what "appeared to be a bullet wound" on Foster's neck. Br. in Opp. 8. Not only has that paramedic long since recanted his initial impression, *Starr Report*, J.A. 133-134 n.77, but, as the D.C. Circuit observed, "[w]hen multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification. Nor does it suggest that the congressional or independent counsel inquiries got anything wrong regarding Foster's wounds." *Accuracy in Media*, 194 F.3d at 124. Indeed, had all of the hundreds of officials and experts involved in every stage of each of the five investigations expressed perfectly harmonized observations and assessments, respondent might have pointed to that wholly unnatural cohesion as evidence of a coordinated and well-rehearsed coverup. FOIA's protection of individual privacy ought not be sacrificed to such win-win conceptions of the public interest.

wrongdoing. See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *United States* v. *Nix*, 189 U.S. 199, 206 (1903); *Bank of the United States* v. *Dandridge*, 25 U.S. 64, 69-70 (1827) (the law "presumes that every man, in his private and official character, does his duty, until the contrary is proved").

Within the framework of FOIA, that standard requires a FOIA requester to identify new (as opposed to already refuted), credible, and objectively reasonable evidence of misfeasance before an allegation of governmental misconduct will rise to the level of a cognizable public interest in disclosure. Requiring such a showing performs the important function of differentiating between a personal insistence on individually examining every detail of every stage of a governmental investigation, and the general public interest in ensuring that deaths are properly and reasonably—not obsessively—investigated. Such a distinction is critical because the interests of "someone who has spent many years studying every aspect of [a governmental] investigation in great detail * * * and the public interest are not necessarily identical." *Stone* v. *FBI*, 727 F. Supp. 662, 667 n.4 (D.D.C. 1990) (withholding information pertaining to the investigation of Robert F. Kennedy's assassination), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990). After all, "the same bit of new information considered significant by zealous students of the * * * investigation [c]ould be nothing more than minutiae of little or no value in terms of the public interest." *Ibid.*

It is important to remember, though, that a showing of clear evidence is not needed for every or even most FOIA requests. It need be made only when (i) a FOIA request triggers one of the privacy exemptions, which

entails consideration of the countervailing public interest, and (ii) the public interest asserted is an interest in exposing alleged missteps by governmental actors in the presumptively proper execution of their duties. In that context, such a showing is needed to effectuate a "workable balance," *John Doe Corp*, 493 U.S. at 157, between the public's right of access to governmental records when necessary to know "what the Government is up to," *Reporters Committee*, 489 U.S. at 780, and the "equally important rights of privacy with respect to certain information in Government files," S. Rep. No. 813, *supra*, at 3.[23]

Application of that standard requires reversal of the Ninth Circuit's judgment. In the face of investigations of a death that are among the most thorough in American history, the Ninth Circuit concluded that the results of those five presumptively proper investigations were irrelevant to assessing the public interest. Pet. App. 11a. Rather than require clear evidence of governmental misconduct by the Office of Independent Counsel (or any other investigating entity), the Ninth Circuit concluded that third parties' privacy interests can be overcome by any FOIA requester armed with a theory that, "if believed, would justify *his* doubts." *Ibid* (emphasis added). But Exemption 7(C) required the court of appeals to balance the intrusion into the Foster family's privacy against the "*public* interest in [the photographs'] release," *Reporters Committee*, 489 U.S. at 762 (emphasis added), not respondent's "highly-specialized interests" and "great personal stake in gain-

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[23] *Reporters Committee* establishes that, when FOIA requests seek law enforcement records that contain personal information about individuals and that provide little or no official information about a federal agency, courts may adopt categorical rules, like the "clear evidence" standard. 489 U.S. at 776-780.

ing access to that information," *Stone*, 727 F. Supp. at 667 n.4; see also *Julian*, 486 U.S. at 17 (Scalia, J., dissenting) ("FOIA is not meant to provide documents to particular individuals who have special entitlement to them, but rather to inform the *public* about agency action."). In the absence of new (not repeatedly refuted), reliable, and objectively reasonable evidence of a governmental conspiracy or gross incompetence by all five investigating entities, the public interest in probing Foster's death and receiving a full report of those investigations has been thoroughly satisfied.

In support of its contrary approach, the court of appeals invoked "famous cases" in history that "generate controversy, suspicion, and the desire to second guess the authorities," and concluded that FOIA "establishes a right to look, a right to speculate and argue again." Pet. App. 11a. But this case is not about respondent's right to persist in his own beliefs or to "speculate and argue." *Ibid.* It is about whether FOIA allows respondent to feed his curiosity with personal information the disclosure of which would inflict anguish on other private individuals. Nor is this case about whether the "authorities" should be *second*-guessed. It is about whether, given the five prior investigations, the general public has an interest in a *sixth* guess by respondent. This Court has answered that question: "Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy." *Ray*, 502 U.S. at 179.[24]

In short, contrary to the Ninth Circuit's supposition, FOIA does not afford members of the public a single-minded "right to look" (Pet. App. 11a) at all information

[24] As the D.C. Circuit concluded, the "likelihood that the photos contradict the statements of all [prior] investigating agencies seems remote." *Accuracy in Media*, 194 F.3d at 124.

about individuals in governmental records. Quite the contrary, whenever an individual's interest in "look[ing]" has run up against the privacy interests of third parties, "none of [this Court's] cases construing the FOIA ha[s] * * * found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." *Reporters Committee*, 489 U.S. at 774-775. The Ninth Circuit's approach fails to account for the practical reality that allegations of governmental misconduct are "easy to allege and hard to disprove," *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998). Indeed, some FOIA requesters have an unlimited capacity to see new indicia of governmental conspiracy or coverup at every turn. Simply asking, as the court of appeals did here, whether such speculation and suspicions, "if believed," would suggest governmental misconduct—which, by definition, they would—would transform FOIA's "workable balance" into an easily circumvented pleading requirement.

2. The Public Interest In Probing Foster's Death Has Been Satisfied By The Voluminous Disclosures Of Information Already Made By The Government

Even if the Court were to conclude that there is some remaining public interest in further probing Foster's death, the court of appeals erred in ordering release of the photographs because their disclosure would not significantly advance that public interest or otherwise reveal the operations or activities of the Office of Independent Counsel or other governmental actors.

a. In the first place, the public interest in disclosure of the specific information sought must be measured against the amount of information that is already in the public domain. In *Ray*, this Court sustained the government's withholding on privacy grounds of the identi-

ties of repatriated Haitian refugees who had been interviewed by the State Department, reasoning that the "public interest has been adequately served by disclosure of the redacted interview summaries." 502 U.S. at 178.[25] By giving no weight to the enormous volume of information already released by the government, the Ninth Circuit found the public interest requirement to be satisfied by information the disclosure of which could contribute only marginally, if at all, to public understanding.

In this instance, the government has already publicly disclosed Foster's autopsy report; diagrams and sketches of his body, head, and brain from the autopsy; details about his blood tests, the medication he was taking, and information about the state of his stomach

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[25] Other courts of appeals likewise have discounted the public interest in further disclosures based on the amount of information already in the public domain. See *Halloran*, 874 F.2d at 324 & n.13 (the public interest "in learning about the nature, scope, and results of the [Veterans' Administration]'s investigation of, and its relationship with, one of its contractors * * * has already been substantially served by the release of the redacted transcripts and the VA's report on the investigation, from which the full nature and extent of the VA's actions, as well as whatever the VA learned from its surreptitious recording of the conversations, can be discerned."); *id.* at n.13; *Marzen*, 825 F.2d at 1153-1154 ("While it is true that the circumstances surrounding the life and death of Infant Doe are of substantial public interest, release of the intimate details contained in the medical records would not appreciably serve the ethical debate since most of the factual material concerning the details of the case, including the final HHS report, are already in the public domain."); *Bast*, 665 F.2d at 1255 ("While these are important public interests, we note that they have been served to a large extent by the substantial release of information already made in this case. Thus, it is the incremental advantage to the public of releasing the undisclosed portions of the twelve documents which must be weighed against the invasion of personal privacy."); *Stone*, 727 F. Supp. at 666.

contents; more than 100 pictures of the gun Foster used and other images from the death scene (such as Foster's car); descriptions and photographs of the contents of Foster's car; countless descriptions of the body by witnesses and investigating officials; a number of analyses of his psychological state; the results of laboratory analyses of the gun, DNA, blood found at the scene, gunshot residue, and Foster's clothes and eyeglasses; the depositions and interviews of and communications with countless witnesses, officials, family members, and friends relevant to the investigation; the contents of a note Foster wrote shortly before his death; and detailed descriptions of Foster's activities and behavior in the days leading up to his death, down to the contents of his last lunch. Significantly, moreover, the Park Police's descriptions of the contents of the photographs respondent seeks have been released. 2 *Death of Vincent Foster Hearings* 2112. Independent Counsel Starr published a 114-page report, with a 25-page appendix. See J.A. 97-212; 1 C.A. R.E. 248-273. Independent Counsel Fiske published a 58-page report with 138 pages of appendices. See *Fiske Report*, *supra*. The Senate published two volumes—amounting to 2700 pages—of evidence and testimony from individuals involved in the investigation, see 1 & 2 *Death of Vincent Foster Hearings*, *supra*, and issued its own 54-page report, S. Rep. No. 433, *supra*. Representative Clinger filed an eight-page report on behalf of the minority members of the House of Representatives' Government Operations Committee.

In short, the records already released "reveal the entire course of the investigation and the facts it uncovered." *Miller* v. *Bell*, 661 F.2d 623, 630-631 (7th Cir. 1981) (per curiam), cert. denied, 456 U.S. 960 (1982). The released materials have provided ample opportun-

ity for respondent to evaluate and critique the government's conduct. The qualitatively distinct injury to Foster's family that public release of the pictures of his dead body would inflict thus is not outweighed by any measurable, let alone significant, contribution to public understanding or public debate. "[A]ny public interest in pursuing the completeness and adequacy of the investigation beyond this point [is] minimal in the extreme." *Ibid.*

Furthermore, only an artificial and wooden conception of the public interest would *always* weigh in favor of more disclosure. See *Fund for Const. Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 865 n.22 (D.C. Cir. 1981). The more realistic assessment is that, in light of the numerous and lengthy investigations that already have taken place, the vast amount of detailed personal information that already has been disclosed, and society's (not just the family's) interest in repose a decade after Foster's death, the public at large would not consider its interests to be well served by having its government serve as the instrument for reopening the Foster family's wounds.

b. FOIA's "central purpose" is to inform the citizenry about "what their government is up to," and to "ensure that the Government's activities [are] opened to the sharp eye of public scrutiny." *Reporters Committee*, 489 U.S. at 773-774; see also *Department of Defense* v. *FLRA*, 510 U.S. at 497 (FOIA's purpose is to "'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'").

The crux of respondent's argument for disclosure, however, is *not* that he lacks knowledge of how the Office of Independent Counsel conducted its investigation. He knows exactly what the Office did, has seen

much of the same evidence, and has devoted considerable time and hundreds of pages of briefing in this litigation to scrutinizing and critiquing it. Respondent simply disagrees with, or at least is not yet personally satisfied with, the conclusions that the Independent Counsel reached. FOIA's purpose, however, is not to obviate the persistent disbelief of a few; it is to let the public as a whole know what the government has done and to permit informed debate. Respondent's filings in this case, not to mention his website and the published books he cites (Br. in Opp. 9), stand as a testament that the public interest in examining both the death of Vincent Foster and the government's investigations of it "has been adequately served." *Ray*, 502 U.S. at 178.

Furthermore, the photographs themselves reveal nothing directly about the Office of Independent Counsel's activities; they reveal only the tragic consequences of Vincent Foster's personal conduct.[26] The photographs that respondent seeks thus are not themselves official records or information *about* the Office of Independent Counsel or its investigation into Foster's death. Nor does respondent need the photographs to determine whether the government's collection of photographs at the scene was consistent with proper law enforcement techniques. How many photographs were taken and what aspects of the death scene and Foster's body were photographed is already a matter of public record.

To the extent that respondent instead wants the photographs to supplement his own shadow investigation and to buttress his personal interpretation of the

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[26] The photographs were not taken by the Office of Independent Counsel and, indeed, that Office had no involvement in the Foster investigation until months after the death the photographs depict.

evidence surrounding Foster's death, that is a proposed *derivative* use of the records sought under FOIA. The photographs themselves do not directly reveal information about the government itself or "what the Government is up to." *Reporters Committee*, 489 U.S. at 780. While the majority in *Ray* left open the question whether a derivative use "would *ever* justify release of information about private individuals," 502 U.S. at 179 (emphasis added), Justices Scalia and Kennedy concluded that an asserted public interest under FOIA "must be solely upon what the requested information reveals, not upon what it might lead to," *id.* at 180 (Scalia, J. concurring) (emphasis omitted). More recently, in *Department of Defense* v. *FLRA*, the Court concluded that a union's intended derivative use of names and addresses to facilitate collective bargaining was not a cognizable public interest under FOIA. 510 U.S. at 497; see also *FLRA* v. *Department of Veterans Affairs*, 958 F.2d 503, 512 (2d Cir. 1992) (taking into account all possible derivative uses of information "would inevitably result in the disclosure of virtually all personal information, thereby effectively eviscerating the protections of privacy provided by [the FOIA]").

In short, FOIA's purpose is to allow the public to understand the operations of government; it is not to deputize every citizen as a private independent counsel with the unlimited right to examine and reevaluate all information in the government's hands in order to advance his own investigation.

3. The Photographs Ordered Released Lack Any Substantial Nexus To The Asserted Public Interest

No matter how meritorious respondent's asserted public interest, the court of appeals erred in ordering disclosure of the four photographs of Foster at his death scene because they cannot shed any relevant

light on his interest in exposing deficiencies in the Independent Counsel's investigation, see Pet. App. 58a. In weighing the public and private interests implicated under Exemption 7(C), a court "must weigh[] the specific privacy invasion against the value of disclosing a given document." *Senate of Puerto Rico*, 823 F.2d at 588; see also *ibid.* ("[T]he Senate has not adequately supported its 'public interest' claim with respect to the specific information being withheld.").

Respondent has identified four general areas of the investigation in which he alleges that the Office of Independent Counsel fell short. The first three areas of the investigation respondent cited to the court of appeals involved "which officials were present during Vincent Foster's autopsy," "witness identifications of Mr. Foster's car in Fort Marcy Park at the time of his death," and "possible discrepancies between the kind of gun that was reportedly found at the scene of Mr. Foster's death and the gun identified by his widow." Pet. App. 39a-40a; see also Br. in Opp. 23-24. The ordered release of photographs of Foster's right shoulder, arm, and torso, however, have no relevance to and can shed no light on the persons present at or the subsequent autopsy of Foster, or the appearance of Foster's abandoned car in the parking lot at Fort Marcy Park, some distance from where Foster took his life.

Only one of the four photographs the court of appeals ordered released depicts the gun in Foster's hand. But "[m]any of the 119 photographs already released to Mr. Favish depict the gun that was found at the scene." Pet. App. 40a. Respondent has made no showing, and the court of appeals offered no explanation, for how disclosure of yet another picture of the gun would materially advance the public interest. Beyond that, respondent's personal interest in seeing every picture

of the gun in the possession of the government because, in his view, the government is "demonstrably untrustworthy and deceptive" (Br. in Opp. 6) cannot be equated with the "public" interest.[27]

The remaining aspect of the investigation that respondent has identified is alleged inconsistencies in the description of the entrance and exit wounds—specifically, whether the wounds were in Foster's head or neck. Pet. App. 40a-41a; see also Br. in Opp. 8-12. But the photographs that the court of appeals ordered released, by their description in the district court opinion based on the government's *Vaughn* index, do not show any part of Foster's head or neck or any aspect of the bullet wound or the bullet's path. They

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[27] The prior unauthorized disclosure of the photograph to *Time* magazine does not affect the balance under FOIA. Such wholly unauthorized activity cannot waive either the government's interest in withholding the photograph from official release or the Foster family's profound privacy interests in cabining dissemination of the photograph, which depicts a portion of Foster's body. See *Department of Defense* v. *FLRA*, 510 U.S. at 500 ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."); *Reporters Committee*, 489 U.S. at 767 ("[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public."); *Rose*, 425 U.S. at 380-381; *Sherman* v. *Department of the Army*, 244 F.3d 357, 363-364 (5th Cir. 2001) ("[T]he fact that otherwise private information at one time or in some way may have been placed in the public domain does not mean that a person irretrievably loses his or her privacy interest in the information."); *Halpern* v. *FBI*, 181 F.3d 279, 297 (2d Cir. 1999) ("Confidentiality interests [under Exemption 7(C)] cannot be waived through prior public disclosure."); *Bast*, 665 F.2d at 1255 ("[P]ublicity in the popular media cannot vitiate the FOIA privacy exemption for official information."). In any event, the public

are pictures "focusing on Rt. side shoulder/arm"; "Right hand showing gun & thumb in guard," which hand was positioned next to Foster's hip; "focusing on right side and arm"; and the "top of head thru heavy foliage." Pet. App. 45a-46a. Having reviewed the pictures *in camera* (see J.A. 7, 20), both the district court and the court of appeals were fully apprised that those photographs would do nothing to facilitate respondent's inquiry into the bullet's trajectory. Indeed, the district court, summarily affirmed by the court of appeals, could say nothing more than that the photographs "may be probative of the public's right to know." Pet. App. 45a.

In fact, it is only the photographs that the court of appeals correctly held were *exempted* from disclosure—the dramatically more graphic shots of Foster's head and face—that bear any potential relation to respondent's asserted interest in studying the bullet's path. As the D.C. Circuit explained, "[g]iven the subject matter, we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic." *Accuracy in Media*, 194 F.3d at 125. Unable to release the only photographs relevant to the purported public interest because of the enormous intrusion on family privacy, however, the Ninth Circuit had no equitable license to offset that withholding by ordering the release of different photographs that bear no relationship to advancing the asserted public interest.

Instead, the "workable compromise between individual rights" to privacy and the public's right to information about the government, *Rose*, 425 U.S. at 381, that FOIA's Exemption 7(C) embodies dictates that all of the pictures of Foster's dead body be kept "away from the public eye," *Reporters Committee*, 489 U.S. at

tions into his death and voluminous disclosures of information that already have taken place. The *public*'s interest in matters pertaining to his death and its investigation has been satisfied.

CONCLUSION

The portion of the judgment of the court of appeals ordering the release of four photographs should be reversed.

Respectfully submitted.

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